

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Frederic H. Sorensen,
Petitioner,
v.
Northeast Metro 916,
Respondent

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on Tuesday, December 2, 1997, at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated July 22, 1997. The record closed at the conclusion of the hearing on December 2, 1997.

Bridget M. Lindquist, Rajkowski, Hansmeier, Ltd., Attorneys at Law, 11 Seventh Avenue North, P.O. Box 1433, St. Cloud, MN 56302-1433, appeared on behalf of petitioner. Joseph E. Flynn, Knutson, Flynn, Deans & Olsen, P.A. Attorneys at Law, Minnesota World Trade Center, 30 Seventh Street East, Suite 1900, St. Paul, MN 55101-1900, appeared on behalf of respondent.

NOTICE

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the commissioner of the department of veterans affairs shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the commissioner. Exceptions to this Report, if any, shall be filed with the commissioner. The parties should contact Gerald Bender, Minnesota Department of Veterans Affairs, 2XX Veterans Services, 20 West 12th Street, St. Paul, MN 55155, telephone (612) 297-5828 to ascertain the procedure for filing exceptions or presenting argument to the commissioner.

STATEMENT OF ISSUE

The issue in this case is whether the respondent abolished petitioner's job in good faith for purposes of Minn. Stat. § 197.46 (1996).

Based upon all of the proceedings herein, the administrative law judge makes the following:

FINDINGS OF FACT

The petitioner, Frederic H. Sorensen, is an honorably discharged veteran of the United States Marine Corps. He had over two years of military service between 1967 and 1969.

Respondent is one of three intermediate school districts serving the Twin Cities Metropolitan area. It has approximately eleven school district members serving 100,000 students on the easterly side of the Metropolitan area. It was established in 1969 when about a dozen independent school districts in Anoka, Ramsey and Washington counties entered into an agreement to establish an intermediate school district (No. 916) under Minn. Stat. § 136D.71. The school board of the intermediate school district is composed of at least one member from each independent school district covered by the agreement. At that time, respondent was authorized to provide technical college facilities and instruction in vocational technical education and special education. Under that authority it operated a technical college in White Bear Lake. Respondent was also authorized to provide other programs and services requested by a participating school district, and had power to employ and discharge necessary employees. Minn. Stat. § 136D.73.

On July 6, 1996 petitioner was hired by respondent as a chief engineer at an annual salary of approximately \$38,800. His annual salary included a biweekly payment of \$75.00 (lead pay) to compensate him for his supervisory duties over custodial employees. As the chief engineer, petitioner was a union member covered by a bargaining agreement between the respondent and the International Union of Operating Engineers, Local 70. The agreement covered all of the respondent's custodial\maintenance employees. Joint Exhibit 1.

As the chief engineer, petitioner supervised the maintenance and custodial activities at three sites: Capital View Center, Transition and Valley Crossing. Capital View was used primarily as a meeting facility. Valley Crossing, which was under construction when petitioner was hired, was a special school operated by respondent for three of its member districts. Each of the three facilities had its own lead custodian. Steve Dunlap was lead at Valley Crossing; Dave Bjorkman was lead at Capital View; and Dean Everson was lead at Transition. Petitioner supervised these men and frequently worked with them. He also worked for them when they were absent, approved their absences from work, directed their activities, approved their requests for equipment and supplies, and generally supervised their day-to-day activities.

Prior to July 1, 1995, Respondent had the power to levy taxes and issue bonds. It collected approximately \$7.5 million annually under its taxing power. Effective July 1, 1995, laws relating to intermediate school districts were substantially changed. Respondent's power to levy taxes and issue bonds was repealed and the technical college in White Bear Lake was taken away from the respondent as part of the consolidation of all technical schools, community colleges and state universities into the Minnesota State Colleges and Universities (MNSCU). As a result of the latter action, respondent lost approximately one-third of its employees -- those who opted to go with MNSCU. The changes made

effective July 1, 1995 had a significant impact on the respondent, which, as a result of the changes, was thrown into a market environment because school district members now had the option to pay for the respondent's services and programs or provide those services themselves. Two of respondent's larger member districts (Roseville and Mounds View) were openly talking about terminating their memberships. Had they done so, the respondent would have lost approximately ten percent (10%) of its total membership fees¹.

As a result of the 1995 legislative changes, respondent's continued existence was in doubt and needed to be reevaluated. In August 1995 it hired a new superintendent, Don Lifto, and, in October, the respondent's Board adopted a transition plan which called for a survey of its members and an examination of its programs, services and goals. One of the first steps taken to retain its members was the reduction of membership fees from \$50 to \$28. In January 1996 Watson Consulting Group (Watson Consulting) was retained to perform a market analysis and organizational assessment study. District Exhibit 1.

While Watson Consulting was making its study, Tom Tapper, respondent's business manager, hired petitioner as a chief engineer to coordinate the activities at the three sites previously mentioned. No one had filled that position immediately prior to the time the petitioner was hired². Several weeks after petitioner was hired, Tapper resigned. He was replaced by Jeffrey M. Priess. Priess was hired to fill-in for Tapper and to help in respondent's reorganization.

Priess is a certified public accountant and holds a B.S. degree in that field. He has spent his entire 13-year career working for public schools. Prior to 1996, when he first began working for respondent, Priess had worked five years for the Chaska school district as its business manager and director of finance. On April 1, 1997, after the respondent's business office was reorganized, Priess was appointed business manager. In that capacity, he reported to the assistant superintendent.

In 1996, when Priess took over Tapper's job, his primary charge was to reorganize the business office. However, he was also responsible for taking other steps to eliminate duplication and save money.

On July 25, 1996 Watson Consulting completed its final report. In its report it found, among other things, that respondent had too many middle managers and supervisory personnel. District Ex. 2 at 18 (part B1).

On March 3, 1997, the respondent's business office was reorganized in a manner consistent with the Watson report. District Ex. 2 at 16 (part A3). The reorganization saved the respondent \$50,000 annually reducing

1 At this time, respondent's members paid an annual membership fee of \$50 for each of their pupils.

2 Prior to July 1, 1995 the respondent had a chief engineer. When the technical college was transferred to MNSCU that individual stayed with the technical college and was no longer an employee of the respondent. Hence, between July 1, 1995 and the date that the petitioner was hired, the respondent did not employ a chief engineer.

its staff by one full time equivalent (FTE). One of the cost savings realized by the reorganization involved the elimination of the middle management position of Director of Finance and Human Services. It was replaced with a lead accounting position. District Ex. 4. After Priess was retained to replace Tapper, he became dissatisfied with Sorensen's job performance. He received some complaints from building managers and had other concerns relating to Sorensen's poor followthrough, departures from procedures, hiring temporary workers without prior approval, slow paperwork, and poor communications. Priess mentioned his dissatisfaction to Lifo and informed Lifo that he did not intend to retain Sorensen after his probationary period expired.

On or about May 26, 1997, the State Fire Marshall conducted a routine inspection³ of Park View Center. Petitioner was working at Valley Crossing school that day filling in for an absent employee. While he was working, Priess appeared. Priess told Sorensen he had to talk to him and proceeded to inform Sorensen that he would not be retained after his probation ended. At that time, Priess thought Sorensen's probationary period was for one year and would expire on July 6, 1997. When Sorensen asked him why he was not going to be retained, Priess said he did not want to discuss it.

After Priess left, petitioner telephoned his union steward, Dean Everson, to seek his assistance. The steward later called the union's business agent, Bruce Yernberg, to discuss the matter. On or about May 30, Yernberg telephoned Priess and told him that petitioner's probationary period was only six months long and had expired months ago. Priess responded stating: "Then we'll let him go for cause." Yernberg asked Priess if any discipline or progressive discipline had been taken against Sorensen. Since there had been none, Priess dropped the idea of dismissing him. Priess subsequently informed Yernberg that Sorensen's position was being eliminated for economic reasons.

On June 10, 1997 Priess told Sorensen that the school board would be eliminating his position "to economize the maintenance operations budget" and that he would be reassigned to a custodial position in the district. Ex. A. Petitioner never received written notice of his right to a hearing on his removal.

On Wednesday, June 18, 1997 the school board resolved to eliminate Sorensen's chief engineer position effective June 30, 1997. The next day, Priess wrote to Sorensen and informed him that his seniority within the maintenance unit would enable him to accept one of three custodial positions. Ex. B. Petitioner subsequently accepted a custodial position at Transition.

On July 1, 1997, Yernberg filed a grievance regarding the school board's elimination of petitioner's position. In the grievance report, Yernberg requested that petitioner be reinstated to the position of chief engineer. Priess denied the grievance at Level 1 and the union requested a Level II review

3 The fire marshal is responsible for inspecting school buildings once every three years.

by the superintendent. On August 18, 1997 the superintendent denied the grievance. The union did not pursue the grievance further.

Petitioner's position was abolished by the respondent in order to remove Sorensen from his position due to his unsatisfactory job performance. The averments that Sorensen's position was eliminated to reduce costs and reorganize the business office are pretextual.

The duties previously performed by the petitioner were reassigned to employees more senior than petitioner and to Priess, whose position petitioner is not qualified to fill.

After petitioner's position was eliminated no new employee was hired to perform his prior duties.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

The administrative law judge and the commissioner of veterans affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481 (1996).

The parties received proper notice of the issues in this proceeding and the department of veterans affairs has complied with all relevant substantive and procedural requirements of statute and rule, and this matter is, therefore, properly before the administrative law judge.

Petitioner is an honorably discharged veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447 of the Veterans Preference Act.

Minn. Stat. § 197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing.

Public employers may abolish positions held by veterans notwithstanding the Veterans Preference Act if the abolition of the position is in good faith. Young v. City of Duluth, 386 N.W.2d 732, 738 (Minn. 1986).

The notice requirement in Minn. Stat. § 197.46, which requires an employer to provide written notice of a removed employee's veterans preference rights is applicable to cases in which a public employer claims it is abolishing a veteran's position. Young v. City of Duluth, 386 N.W.2d 732, 738 (Minn. 1986).

The burden of proof is upon petitioner to prove by a preponderance of the evidence that he was removed from public employment without a hearing. Once a removal is established, the burden of proof is upon the employer to establish, by a preponderance of the evidence, that the veteran's position was abolished in good faith. Minn. R. 1400.7300, subp. 5 (1995); Martensen v. Minneapolis Board of Education, OAH Docket No. 55-3100-8473-2

(April 13, 1994) (adopted by the commissioner of veterans affairs in a decision and order dated June 30, 1994); Oleson v. Benton County, OAH Docket No. 69-3100-5670-2 (August 26, 1991) (adopted by the commissioner of veterans affairs in a decision and order dated October 1, 1991); Obedoza v. Metropolitan Transit Commission, OAH Docket No. 4-3100-5640-2 (March 4, 1992) (adopted by the commissioner of veterans affairs in the decision and order dated October 23, 1991, aff'd on other grounds, 1992 W.L. 350279 (Minn. Ct. App. 1992). Cf. Holmes v. Board of Commissioners of Wabasha County, 402 N.W.2d 642 (Minn. Ct. App. 1987).

Petitioner was removed from his position as the chief engineer for purposes of Minn. Stat. § 197.46 (1996).

Petitioner was removed from his chief engineer position due to dissatisfactions with his job performance and not because of a good faith decision to abolish his position for economic reasons.

As a result of the respondent's bad faith removal, petitioner is entitled to notice of his right to a hearing and payment of all the wages, retirement contributions and benefits he would have received had he not been removed from his position, and he is entitled to continue receiving the salary and benefits he would have received until such time as (1) a hearing on his removal is held and a decision is reached, (2) a notice of hearing is issued and petitioner fails to make a timely request for a hearing, or (3) petitioner is reinstated to his former position.

Based upon the foregoing Conclusions, the administrative law judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the commissioner of veterans affairs order that the petition of Fredric H. Sorensen be GRANTED and that the respondent be ordered to pay petitioner the wages he would have received had he not been removed from his position -- less any amounts he has been paid -- and all other monetary benefits petitioner would have received until such time as the respondent (1) provides petitioner with notice of his veterans preference rights and a decision is reached following a hearing or the 60-day notice period expires without a request for a hearing, or (2) petitioner is reinstated without the loss of any benefits.

Dated this 29th day of December, 1997.

JON L. LUNDE
Administrative Law Judge

Reported: Taped: 4 Tapes

NOTICE

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

This proceeding arises out of Veterans Preference Act (VPA or Act), Minn. Stat. § 197.46 (1996). Petitioner alleges that the respondent violated the VPA when it abolished his position as chief engineer resulting in his acceptance of a lower-paying custodial position. Petitioner argues that he is entitled to reinstatement and compensatory damages which will make him whole.

Minn. Stat. § 197.46 governs a veteran's removal from employment with a school district or other public employer. With respect to removals, it states, in part, as follows:

No person holding a position by appointment or employment in the several . . . school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

The courts have held that the statute does not apply to the good faith abolition of a position held by a veteran. In State ex. rel Boyd v. Matson, 155 Minnesota 137, 141-42, 193 N.W. 30, 32 (1993) the court discussed this exception to the statute stating:

The purpose of this section [the Veterans Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called Veterans Preference Act.

In Young v. City of Duluth, 386 N.W.2d 732, 738-39 (1986), the court elaborated on the good faith exception to the Act stating:

If the City merely assigned Young's duties to nonveteran employees less senior than he, his position was not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans Preference Act is applicable to cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the Act exists for such situations. Thus, veterans have a preference over nonveteran employees less senior than they to continue to perform duties for which they are qualified if the public employer continues to need such duties performed. * *

*

Respondent denies any violation of the Act arguing that Sorensen's position was eliminated in good faith: to reorganize the maintenance function and reduce costs. The respondent's assertions of good faith are not persuasive. On the contrary, the record contains more credible evidence that Sorensen's position was abolished in order to remove or demote him. Lifto testified that Priess was dissatisfied with Sorensen's job performance. His dissatisfactions related to poor followthrough, departures from established procedures, hiring temporary employees without approval, slow paperwork and communication concerns. According to Lifto, Priess said that he did not intend to retain Sorensen after Sorensen's probationary period ended. At the time of this statement, Priess believed that Sorensen's probationary period ended on July 6, 1997. Lifto also stated that Priess told him that he would not recommend retaining Sorensen after his probationary period ended.

Consistent with Priess's stated intentions, on or about May 28, 1997 Priess went to Valley Crossing where Sorensen was working and told him the district was exercising its right not to approve his continued employment after his probationary period ended. At that time, Priess clearly intended to remove Sorensen from his job due to dissatisfactions with Sorensen's job performance. If Priess had some other reason, such as abolishing Sorensen's position, Priess would have said so and likely offered an explanation and an apology. However, he offered none. Even when Sorensen asked Priess if there was a reason for not retaining him, Priess said he did not want to get into it and left. Priess believed no explanation was required.

Subsequently, Sorensen contacted his union steward who, in turn, contacted Yernberg, the business agent. Yernberg called Priess early in June. At that time, Yernberg told Priess that Sorensen's probationary period had ended approximately five months previously. Priess responded by saying that under those circumstances Sorensen would be discharged for cause. When the business agent pointed out that Sorensen had never been disciplined Priess dropped that idea and told Yernberg at that time or a few days later that Sorensen's chief engineering position was being eliminated for economic reasons. Within two weeks, his position was eliminated by the board of

education on Priess's recommendation, and Sorensen accepted a lower-paying custodial position. This persuades the administrative law judge that Sorensen's position was not eliminated in good faith and that Priess's dissatisfactions with Sorensen's job performance were the primary, if not the only, reason for the abolition of Sorensen's job as chief engineer.

Although Priess testified that job dissatisfactions had nothing to do with his recommendation to eliminate Sorensen's job, his testimony on that point was inconsistent with his statements to Lifto and was not persuasive. Priess told the superintendent that he was dissatisfied with Sorensen's job performance; Priess went to Sorensen and told him that he was not being retained after his probationary period expired; when Priess learned that Sorensen's probationary period had already elapsed and that there had never been any disciplinary action taken against him, Priess informed the union that Sorensen's position was being eliminated for economic reasons.

This chain of events raises a reasonable inference that Sorensen was removed from his position because of dissatisfaction with his job performance and that the other reasons given for his removal are pretextual. The inference is strengthened by the fact that Priess did not deny Sorensen's testimony that when Priess learned that Sorensen's probation had elapsed, he told Yernberg that petitioner would be removed for cause. Realizing that it would be difficult to remove petitioner for cause under progressive disciplinary principles which Yernberg mentioned at that time, Priess found another ground for Sorensen's removal. This suggests that Priess was attempting to find some feasible way of removing Sorensen without a hearing due to Sorensen's performance.

Although the respondent was seeking ways to reduce costs, Sorensen's job was eliminated after the initial organizational steps to reduce costs were taken and was the only position the school board considered at its June 10 meeting. Although the district had financial concerns and wanted, as a general rule, to reduce costs, at the time Sorensen's position was eliminated there is no persuasive evidence that it had dire or even difficult financial problems, and the worries Lifto had about the withdrawal of the Mounds View and Roseville school districts had been resolved when both decided in February 1996, to remain members. There is another reason for rejecting the respondent's witnesses testimony. It is unlikely that respondent would have hired Sorensen if its financial condition was in the potentially critical state Lifto implied. If it truly was in critical financial condition, one would have expected Lifto to object when the board considered his appointment. At that time maintenance and custodial functions had been handled without a chief engineer and organizational changes were under investigation. Nonetheless, Sorensen was hired. Considering all the evidence presented, the administrative law judge is persuaded that Sorensen's position was not eliminated in good faith.

J.L.L.